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Applicants:	John E. Davis, et al.
Title:	FLUID ABSORBENT ARTICLE FOR SURGICAL USE
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Commissioner for Patents
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U.S. Patent No. 6,603,052

SUPPLEMENTAL STATEMENT OF SHOWING THAT THE DELAY IN TIMELY PAYMENT OF THE MAINTENANCE FEE FOR THE EXPIRED PATENT WAS UNAVAOIDABLE, PURSUANT TO 37C.F.R. §1.378(b)

This Statement of Showing supplements the Original Statement of Showing filed with the original Petition to accept a delay in the payment of the maintenance fee pursuant to 37 C.F.R. §1.378(b) that was filed on June 29, 2010.

That Petition was dismissed pursuant to a Decision on Petition under 37 C.F.R. §1.378(b) mailed September 21, 2010. This renewed Petition, with Supplemental Showing and additional Declarations, is therefore timely filed on [date].

In the Decision dismissing the Petition, Petition's Attorney indicated that the showing was inadequate to establish unavoidable delay. However, as noted, the term unavoidable is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in

relation to their most important business. The inventor and owner of the `052 Patent, John E. Davis, was prudent and careful, and took the necessary and diligent steps to submit payment of the maintenance fee upon actually finding out that a maintenance fee was due for the patent.

In the Decision dismissing the Petition, the issues of Mr. Davis' personal health are indicated as immaterial because it is the lack of any steps in place to pay the fee that caused or contributed to the delay. The Petitioner asserts that it is not submitting the information regarding the health issues to establish that the Petitioner was incapacitated completely from taking action. Rather, the original stroke and health issues are what prevented him from even having knowledge about the maintenance fee issue, or that a maintenance fee was due (Davis Declaration Paragraphs 14-15), and therefore, the inability to take additional steps from the expiration of the patent to the discovery of the original patent document in the archived files was based on the lack of knowledge that anything even had to be done, which was the result of the stroke in 2003.

In the years following the stroke, it was essentially unavoidable that Mr. Davis even knew that he to take any earlier action with respect to the patent from the date of expiration of the patent up until the discovery in the archived files. Certainly, Mr. Davis could not be expected to take action or further steps on an issue that he was not even aware of originally, and had never been aware of (Davis Declaration Paragraph 23). Therefore, the physical condition is what caused the original lack of knowledge, and thus, the requisite and subsequent lack of action regarding payment of the maintenance

fee. This lack of knowledge could not be avoided, as Mr. Davis had a stroke around the time of receiving the original patent, and did not personally remember seeing or handling that original patent or any letter associated with payment of the maintenance fees.

As noted in the Supplemental Davis Declaration, the stroke issue that caused the original failure to know about the maintenance fee and the subsequent mental and cardiac issues that affected John E. Davis from that time to the present date, and affected his efforts to address the maintenance fee delay issue, are real and significant health issues.

Furthermore, the original Petition notes Mr. Davis' acknowledgment that there was not a docketing system in place to track the maintenance fee due date for the patent. However, such an acknowledgment is with respect to any specific actions that Mr. Davis handled himself because, as noted, he had no knowledge that he would even have to set up a docketing system to track maintenance fee due dates because he did not even know about the maintenance fee due date issue to begin with. Again, he would not be expected to act on the issue when he had no knowledge of the issue. That lack of knowledge regarding the maintenance fee issue did not change from the 2003 time frame up until 2009.

However, in further looking into the issue and inquiring about that issue from his daughter, Mr. Davis did, in fact, have a docketing system in place to track the maintenance fee due date, but that docketing/reminder system failed.

More specifically, because Mr. Davis suffered a stroke around the time of payment of the Issue Fee in May, 2003, he could not, and did not, handle the issue of the original patent and the maintenance fee letter (Original Davis Declaration Paragraph 14). This was a significant medical issue that prevented Mr. Davis from handing his business affairs and the affairs associated with the patent (Supplemental Davis Declaration Paragraph 4; Original Davis Declaration Paragraph 14). Accordingly, he turned over his affairs to his daughter, Laura Brumbaugh (Brumbaugh Declaration Paragraph 2).

On Mr. Davis' behalf, Ms. Brumbaugh set up a reminder system in her calendar regarding payment of the maintenance fees. A reminder of August, 2006 to pay the first maintenance fee was entered in her personal calendar. (Brumbaugh Declaration Paragraph 8.) At the time, due to his incapacitation, this calendar and reminder system associated with the maintenance fee for the `052 Patent was the actual docketing and reminder system of the inventor, John E. Davis (Brumbaugh Declaration Paragraph 8; Supplemental Davis Declaration Paragraph 7).

It was absolutely reasonable and prudent for Mr. Davis, in his mental and physical state, to rely upon his daughter, Ms. Brumbaugh, even though he did not know at the time, nor did he remember, the original receipt of the patent and letter therewith. Nor did he know about Ms. Brumbaugh's efforts on his behalf until, through further inquiry, she indicated the steps she had actually taken in her own calendar back in 2003 on his behalf (Original Davis Declaration Paragraph 15; Supplemental Davis Declaration Paragraph 6.) Therefore, while Mr. Davis was incapable of setting up his own docketing

system to track the maintenance fee due date for the patent due to his lack of knowledge about the maintenance fee issue, he reasonably and prudently relied upon his daughter to handle his affairs with regard to the patent matter at the time that the original patent was received. His daughter did indeed set up such a docketing/reminder system for the `052 Patent and maintenance fee deadlines for him. It was a reliable system, as he daughter use it for her businesses as well. Mr. Davis therefore, did have a reminder system in place for paying the maintenance fee.

The docketing system of Mr. Davis, through Ms. Brumbaugh, failed (Brumbaugh Declaration Paragraphs 10-13). This failure was not due to any lack of effort or avoidable circumstance on behalf of either Mr. Davis or Ms. Brumbaugh. Rather, it was a mechanical failure of the hard drive of the computer that ran Ms. Brumbaugh's ACT database that had the data of the reminder date for the maintenance fee in the system. (Brumbaugh Declaration Paragraph 10.) The necessary data for the maintenance fee reminder was lost.

Mr. Davis had no other way of knowing about the maintenance fee date due to his lack of original knowledge as well as the failure of the reminder/docketing system his daughter was maintaining on his behalf due to her earlier assistance in 2003. He had no original knowledge of the maintenance fee issue to even know to take further action, and thus, it could not be avoided that he did not set up his own docketing system.

Furthermore, the docketing/reminder system that John E. Davis had, through his daughter, failed due to a mechanical system failure. It was thus, unavoidable that he did not receive a reminder, because the data appeared to be lost in the mechanical hard drive failure.

Still further, there was no reasonable way that Ms. Brumbaugh could have known what data was lost to remedy the situation (Brumbaugh Declaration Paragraph 11.) A date that was three years away from the 2003 time frame of the system crash would not have been a particular date that Ms. Brumbaugh would reasonably know was missing from the database when the portion of the data was restored. Because of those circumstances, the delay from the expiry of the patent to Mr. Davis' discovery of the original patent in the archived files was unavoidable. There was no other way that Mr. Davis could have addressed that issue.

Mr. Davis has one patent, and he would have no reason to be intimately familiar with the maintenance fee issue of the patent (Original Davis Declaration Paragraph 26). Furthermore, Mr. Davis' daughter, Ms. Brumbaugh, does not have intimate knowledge of the patent process or the maintenance fee issues, but took the necessary steps to docket the dates for payment of the first maintenance fee when she received the original patent (Brumbaugh Declaration Paragraph 20). Accordingly, there is no other way that this delay could have been avoided. The steps taken were certainly reasonable and prudent in the case of ordinary human affairs, as Mr. Davis and Ms. Brumbaugh are individuals and are not associated with a corporation or other entity which handles large numbers of patent properties and various different maintenance fee issues.

Once Mr. Davis discovered the original patent and the maintenance fee issue, he worked diligently to review records, gather the facts, and understand the issues surrounding the event of the delayed payment of the maintenance fee and the

unavoidable circumstances surrounding that delay as well as the ownership issues (Original Davis Declaration). It was necessary to gather the facts and do such a review of old records to even file the original Petition.

There were steps in place to pay the maintenance fee on behalf of Mr. Davis instituted by his daughter (Brumbaugh Declaration Paragraphs 7-9). It was the mechanical failure of the reminder system steps, as well as the lack of Mr. Davis' original knowledge or memory regarding the original patent, that caused the delay, and both of those situations could not be avoided.

With respect to the assignment, Mr. Davis has been able to find and contact the other inventor, Mr. Klonne, to confirm that Mr. Klonne did indeed assign all of his interests and rights to the `052 Patent to Mr. Davis (Klonne Declaration Paragraphs 3-4). Such an assignment certainly addresses the definitions of 37 C.F.R. §3.1, which does not require that such an assignment or transfer be in writing. Furthermore, the reference to 35 U.S.C. §2.61 refers to the fact that the patent shall be assignable by law by an instrument in writing and the effects that it would have with respect to subsequent purchasers regarding the recording of such a written instrument. However, for the purposes associated with payment of the maintenance fees and handling those issue, there is nothing in either 37 C.F.R. §3.1 or 35 U.S.C §2.61 or MPEP §3.01 that prohibits one inventor from orally assigning all the rights, title, and interest to the patent to another inventor that would indeed pass equitable title to the patent. In fact, 35 U.S.C. §2.61 and MPEP §3.01 only deal with issues associated with a written assignment when the assignment is indeed written. As noted in the MPEP and CFR, an

"assignment" is the act of transferring to another the ownership of one's property. For the purposes of patent rights, that is defined as a transfer by a party (Mr. Klonne) of all or part of his rights, title, and interest in a patent. Mr. Klonne transferred the entire ownership to Mr. Davis. (Klonne Declaration Paragraphs 3-4.)

Accordingly, with respect to looking at the issue of unavoidable delay regarding the `052 Patent, it would certainly be reasonable for Mr. Davis to understand and believe that he is the sole owner of the `052 Patent. Furthermore, it would certainly be reasonable for the other inventor, Mr. Klonne, to believe that he did not own the patent any longer, and thus, would not need to do anything further with the `052 Patent. Although the ownership issue had not been memorialized within a written document or recorded at the U.S. Patent Office, ownership had indeed passed based on the understanding of the two parties involved, including Mr. Davis and Mr. Klonne. Therefore, for the purposes of addressing the issue of delayed payment of the maintenance fees, the Patent Office should reasonably recognize and respect the understanding of the two inventors with respect to the patent ownership.

Since the joint inventor Klonne is not an owner of the patent, his actions would not be relevant with respect to the issue of the unavoidable delay in payment of the maintenance fee by Mr. Davis. It is only the circumstances of Mr. Davis' situation and actions as the sole owner of the patent that should be considered.

Mr. Davis reasonably and prudently relied upon other people and calendars in his daily life, and specifically relied upon his daughter, Ms. Brumbaugh, with respect to docketing the maintenance fee due date for the `052 Patent at the time the original

patent was received. Ms. Brumbaugh did indeed docket the date for payment of the maintenance fees. Ms. Brumbaugh's reliable system failed because of a mechanical failure, and the reminder regarding the maintenance fee due date was lost due to a hard drive crash of her computer. Accordingly, Mr. Davis and indeed Ms. Brumbaugh had no way of knowing about the maintenance fee deadline from the time of expiration of the patent up until Mr. Davis' discovery of the original patent document. That lack of knowledge could not be avoided, and it was that lack of knowledge or reminder that caused the unavoidable delay. As such, Mr. Davis had no reasonable chance to take any steps to pay that fee.

Mr. Davis' subsequent diligent efforts to gather all the necessary facts and any documents associated with the delay in payment from the time of the discovery of the original patent up to the filing of the original Petition were certainly reasonable in light of his mental and physical health issues.

Furthermore, it was also reasonable and prudent to not rely upon Mr. Klonne for any efforts in payment of the maintenance fee, as Mr. Klonne did not have an ownership of the patent. Mr. Davis is the sole owner of the patent.

Accordingly, the Petitioner submits that the delay in the timely payment of the maintenance fee was truly unavoidable pursuant to 37 C.F.R. §1.378(b), and the necessary showing herein establishes that unavoidable delay suitable for a grantable Petition to accept the delay in timely payment and to reinstate the patent. This Petition

is timely filed on November 19, 2010, along with the necessary Petition fee. If any additional fees are necessary, the Commissioner may consider this to be a request for such and charge any necessary fees to Deposit Account 23-3000.

Respectfully submitted,

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